SUPREME COURT, U. S.
No. 441

FILED
OCT 19 1961
JAMES R. BROWNING, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1961

ROBERT E. WYNGAARD, PETITIONER

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

HERBERT J. MILLER, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
Attorney,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 441

ROBERT E. WYNGAARD, PETITIONER

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17-19) has not yet been reported. The opinion of the district court (Pet. App. 21-22) is reported at 187 F. Supp. 527.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1961 (Pet. App. 20). The petition for a writ of certiorari was filed on September 23, 1961.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a violation of Section 722(8) of the New York Penal Code, which prohibits frequenting or loitering about a public place soliciting men for the purpose of committing a crime against nature, is a crime involving moral turpitude under the Immigration and Nationality Act.

2. Whether the statutory provision for the exclusion of aliens who have been convicted of a crime involving moral turpitude is unconstitutionally vague.

STATUTES INVOLVED

Section 241(a) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1251) provides:

> (a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> > (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;
>
> * * * *

Section 212(a)(9) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1182(a)(9)) provides:

> Sec. 212(a) [t]he following classes of aliens shall * * * be excluded from admission into the United States:
>
> * * * *

> (9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense), or aliens who admit having committed such a crime, or aliens who admit committing acts which constitute the essential elements of such a crime * * *

Section 4 of the Act of September 3, 1954 (8 U.S.C. 1182a) provides:

> Any alien who is excludable because of the conviction of a misdemeanor classifiable as a petty offense under the provisions of section 1(3) of Title 18 [U.S.C.], by reason of the punishment actually imposed * * * may on and after September 3, 1954 * * * be * * * admitted to the United States if otherwise admissible: *Provided*, That the alien has committed only one such offense.

* * * *

Section 722 of the New York Penal Law provides in part:

> Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> * * * *
>
> 8. Frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness;
>
> * * * *

STATEMENT

Petitioner, an alien, was admitted to the United States in 1948 and in 1957 was readmitted as a lawfully returning resident. He had, in 1952, been convicted of petit larceny in New York for which he was fined $50, and in 1955, of a violation of Section 722(8) of the New York Penal Code, for which he was sentenced to imprisonment for ninety days (J.A. 1-4).[1]

Petitioner was ordered deported on the ground that he was excludable at the time of his 1957 reentry in that he had been convicted of crimes involving moral turpitude (J.A. 2-4). Since a single petty crime involving moral turpitude may be waived under 8 U.S.C. 1182a, *supra*, p. 3, petitioner's deportation was mandatory only if both offenses of which he was convicted are considered crimes involving moral turpitude within the purview of Section 212(a)(9) of the Immigration and Nationality Act.

In a complaint for declaratory judgment filed in the United States District Court for the District of Columbia, petitioner challenged the order of deportation on the ground that a violation of Section 722(8) of the New York Penal Code was not a crime in New York and accordingly that his conviction thereunder was neither conviction of a crime nor of an offense involving moral turpitude (J.A. 1-3). He also contended that the statute was void for vagueness and requested the convening of a three judge

---

[1] "J.A." refers to the joint appendix in the court of appeals.

court (J.A. 2-3, 7). The district court denied the motion to convene a three judge court (J.A. 12) and granted summary judgment for respondent (J.A. 13). The court of appeals affirmed *per curiam* (Pet. App. 17-19.)

ARGUMENT

1. The holding below, that a conviction under Section 722(8) of the New York Penal Code is a crime involving moral turpitude, is in accord with the decisions of the Second Circuit in *Babouris* v. *Esperdy*, 269 F. 2d 621 (C.A. 2), certiorari denied, 362 U.S. 913; *Hudson* v. *Esperdy*, 290 F. 2d 879 (C.A. 2), petition for a writ of certiorari pending No. 382, this Term (both relating to deportation); and *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 409 (C.A. 2) (relating to exclusion). The Second Circuit in those cases rejected the contention that, because the proscribed conduct is described as an "offense" under New York law, it is not a "crime" for the purpose of the federal immigration laws. Petitioner offers no valid reasons why those decisions should not be followed. Indeed, to the extent that this case involves the exclusion provision, Section 212 of the Immigration and Nationality Act (8 U.S.C. 1182), rather than the deportation provision, Section 241 (8 U.S.C. 1251), the intent of Congress to reach all conduct constituting moral turpitude, regardless of labels, is clear. Under Section 212(a)(9) not only are aliens convicted of such crimes excluded, but also excluded are those who admit having committed acts which constitute the essential elements

of such crimes. That Congress understood the section as covering convictions for petty offenses is shown by the Act of 1954, 8 U.S.C. 1182a, *supra*, which provides that one conviction for a petty offense may be waived.

There is no conflict between the decision below and the cases cited by petitioner. *Pino* v. *Landon*, 349 U.S. 901, and the courts of appeals cases cited,[2] all of which arose under the deportation section, involved the question whether there had in fact been a conviction (as to which state law was held determinative), not whether the conviction was for a crime within the meaning of the federal statute. Moreover, even looking to state law, the fact that New York classifies the conduct here involved as an offense does not mean that New York does not regard the offense as a "crime" in the general sense of that term. To the contrary, in *People* v. *Moss*, 309 N.Y. 429, 433 (1956), the court pointed out that the "public offense" of vagrancy under Section 887 of the Code of Criminal Procedure had all the attributes of a criminal proceeding, that a conviction thereof resulted in a penal judgment and execution, and that the proceedings against vagrants were basically as punitive as any sentence imposed for crime. Accord, *People ex rel. Stolofsky* v. *Superintendent*, 259 N.Y.

---

[2] *Holzapfel* v. *Wyrsch*, 259 F. 2d 890 (C.A. 3); *United States ex rel. Freislinger* v. *Smith*, 41 F. 2d 707 (C.A. 7). In the district court cases cited by petitioner (Pet. 7-8, 9), there were no convictions; the issue was whether the acts admitted by the aliens amounted to a crime of moral turpitude.

115, 117-118. See also *People* v. *Pearson*, 69 N.Y. Supp. 2d 242, where it was held that one who aids and abets in the commission of the offense of disorderly conduct may properly be convicted as a principal under Section 2 of the New York Penal Law, which defines a principal as "[a] person concerned in the commission of a crime." The court stated (p. 243) that the offense of disorderly conduct "is in the nature of a crime and has all the attributes of a crime."

2. Petitioner argues (Pet. 13-14) that the offense defined by Section 722(8) does not involve moral turpitude in that it does not require evil intent. The particular section here involved, however, punishes conduct only when done "for the purpose of committing a crime against nature or other lewdness". Thus, assuming *arguendo* that evil intent is required to constitute moral turpitude, a specific immoral intent is an element of this offense.

3. That the use of the term "moral turpitude" does not render the deportation section vague was settled by *Jordan* v. *De George*, 341 U.S. 223. Its reasoning applies with even greater force to the statute setting forth grounds for exclusion. As applied to the particular section of the New York Penal Code involved in this case, there can be no question that the offense involved moral turpitude.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

OCTOBER 1961

☆ U. S. GOVERNMENT PRINTING OFFICE, 1961 615639 458